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RICHARD H.W. MALOY*

INTRODUCTION

A recent feature story in *Time* magazine stated, "Overturning Roe v. Wade is the Evangelicals' highest ambition . . . ."[1] This was supplemental to a previous blurb, under a photo of the U.S. Supreme Court Justices, that proclaimed, "Bush may name replacements for as many as three of the Justices . . . ."[2] Recent and impending changes in the composition of the Supreme Court beg the question whether President Bush could appoint a sufficient number of Supreme Court Justices to overrule Roe v. Wade, 410 U.S. 113 (1975).[3] This Article argues that, regardless of any agenda on the part of new appointees to the Supreme Court, it is very unlikely that *Roe* will be overruled in the near future. If an appointee were intent on the overruling of *Roe*, that person would have to establish, and convince at least four of his or her fellow justices, that the holding of *Roe* is at odds with the supreme law of this land—the United States Constitution. This would not be an easy task: *Roe* is

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1. Karen Tumulty & Matthew Cooper, *What Does Bush Owe The Religious Right?*, TIME, February 7, 2005, at 28.

2. *Id.* at 30; *see* Kenneth L. Manning, Bruce A. Carroll & Robert A. Carp, *George W. Bush's Potential Supreme Court Nominees: What Impact Might They Have?*, 85 JUDICATURE 278, *in seriatim* (2002); William P. Marshall, *The Judicial Nomination Wars*, 39 U. RICH. L. REV. 819, 825 (2005); Alissa Schecter, *Choosing Balance: Congressional Powers And The Partial-Birth Abortion Act of 2003*, 73 FORDHAM L. REV. 1987, 1988 n.12 (2005); Carl Hulse, *Abortion Remark by G.O.P Senator Puts Heat on Peers*, N.Y. TIMES, Nov. 6, 2004, at A1; Robin Toner, *Changing Senate Looks Much Better to Abortion Foes*, N.Y. TIMES, Dec. 2, 2004, at A39.

3. On July 1, 2005, Justice O'Connor announced her retirement effective upon the confirmation of her successor. Chief Justice Rehnquist died on September 3, 2005. On September 29, 2005 he was replaced by Chief Justice John G. Roberts, Jr.

founded in the constitutional principles of the separation of church and state and rights of privacy, among others.

Part I of this Article describes *Roe* in detail; Part II discusses the principal Supreme Court progeny of *Roe* and distills from them four reasons why an overruling of *Roe* is unlikely. First, the overruling of *Roe* would advance the essentially sectarian position that life begins at conception – a judicial construct that would violate the constitutional principle of separation of church and state. Second, what constitutes a "substantial obstacle" and "nonviable fetus" will be grist for the litigation mill to come, but determining these questions does not require an overruling of *Roe*. Third, a majority of the Court currently supports an "emerging awareness" theory of the right to privacy, and will therefore continue to deem abortion a privacy right. Finally, if *Lawrence v. Texas* is any indication, an overruling of *Roe* would require some agreement among the justices that factors beyond philosophy demonstrate the unworkability of *Roe*'s holding. Part III concludes that an overruling of *Roe* is, therefore, unlikely.

I. *ROE V. WADE* (1973)[4]

The seminal case of *Roe v. Wade* began when a pregnant, single woman using the pseudonym "Jane Roe" sued Henry Wade, the District Attorney of Dallas County, Texas.[5] She alleged the unconstitutionality of certain articles of the Texas Penal Code, which make it a crime to procure or attempt an abortion, as therein defined, except for the purpose of saving the life of the mother.

The action was consolidated with another case[6] for trial before a three-judge District Court. Declaratory judgment was granted by the District Court[7] pursuant to the following conclusions of law:

(3) The fundamental right of single women and married persons

4. 410 U.S. 113 (1973).

5. Roe v. Wade, 314 F. Supp 1217, 1219 (N.D. Tex. 1970), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973).

6. Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970). A married couple, using the pseudonym "John and Mary Doe," filed a companion complaint to that of Jane Roe, alleging that if the wife became pregnant, they wished to terminate her pregnancy for both medical and financial reasons. The District Court dismissed the Does' complaint for lack of standing. *Roe*, 314 F. Supp. at 1225. On appeal, the Supreme Court affirmed, finding that the Does' position, that if contraceptive devices failed and if Mrs. Doe became pregnant she would be prevented from having an abortion, presented only a "speculative" claim of an "indirect injury," not within the realm of a "controversy" as required by Younger v. Harris, 401 U.S. 37, 41 (1971). *Roe*, 410 U.S. at 128.

7. *Roe*, 314 F. Supp at 1225.

> to choose whether to have children is protected by the Ninth Amendment,[8] through the Fourteenth Amendment.[9]
> (4) The Texas Abortion Laws infringe upon this right.
> (5) The defendant has not demonstrated that the infringement of plaintiffs' Ninth Amendment rights by the Texas Abortion Laws is necessary to support a compelling state interest.
> (6) The Texas Abortion Laws are consequently void on their face because they are unconstitutionally overbroad.
> (7) The Texas Abortion Laws are void on their face because they are vague in violation of the Due Process Clause of the Fourteenth Amendment.[10]
> (8) Abstention, concerning plaintiffs' request for an injunction against the enforcement of the Texas Abortion Laws, is warranted.

The court held the Texas Abortion Laws unconstitutionally vague but, reluctant to involve itself in state criminal law, did not grant an injunction against their enforcement.[11] The plaintiffs appealed the denial of injunctive relief to the Supreme Court, and took protective appeals to the Fifth Circuit, which held the appeals in abeyance pending decision in the Supreme Court.[12] Thus we have *Roe v. Wade*, in which the Supreme Court issued a seven to two decision[13] affirming in part and reversing in part[14] the ruling of the three-judge District Court in Dallas County, Texas.[15]

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8. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Supreme Court was not in agreement with the conclusion of the District Court that this was the governing provision. *See Roe*, 410 U.S. at 154. The District Court probably was influenced by the Supreme Court's reference to the Ninth Amendment in Griswold v. Connecticut, 381 U.S. 479, 484 (1965), a case that did not concern abortion, but which held unconstitutional a state statute forbidding the use of contraceptives by married people.

9. The Supreme Court never explicitly said that the woman's right to an abortion was "fundamental." *Roe*, 410 U.S. at 152. Justice Scalia, in his dissent in Lawrence v. Texas, 539 U.S. 558, 594 (2003), thought that *Roe* stood for that position, but that Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), by implication did away with that holding.

10. The Supreme Court did not reach the vagueness issue. *Roe*, 410 U.S. at 164.

11. *Roe*, 314 F. Supp. at 1224.

12. *Roe*, 410 U.S. at 122.

13. *Roe*, 410 U.S. 113 (1973). Chief Justice Burger and Justices Powell, Blackmun, Brennan, Douglas, Marshall, and Stewart constituted the majority. Justice White dissented, joined by then Justice Rehnquist, who wrote a separate dissenting opinion. The Chief Justice and Justices Douglas and Stewart wrote concurring opinions.

14. The only part of the District Court's ruling that was reversed was its failure to dismiss the intervening physician's complaint. *Id.*, 410 U.S. at 166.

15. The Court did not decide whether the District Court erred in withholding injunctive relief because it assumed that the Texas prosecutorial authorities "will give

Justice Blackmun, writing for the majority, addressed eight matters of general interest pertaining to abortion policy: (1) ancient attitudes about abortions,[16] (2) the Hippocratic Oath,[17] (3) the common law,[18] (4) the English statutory law,[19] (5) the American law,[20] (6) the position of the American Medical Association,[21] (7) the position of the American Public Health Association,[22] and (8) the position of the American Bar Association.[23] In considering these eight matters, the Court demonstrated a willingness to take into account not only traditional notions of individual privacy rights, but also the positions of the medical and scientific community.

Justice Blackmun also considered the reasons advanced to "explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence."[24] He dismissed, almost immediately, the first reason, "a Victorian social concern to discourage illicit sexual conduct,"[25] by reciting that

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full credence to this decision that the present criminal abortion statutes of that State are unconstitutional." *Id.* at 166.

16. *Id.* at 130. Ancient religion did not ban abortions. *Id.* In a later part of his opinion Justice Blackmun stated that the Stoics thought that life does not begin until live birth. *Id.* at 160.

17. *Id* at 130-32. Though the Hippocratic Oath provided that "I will not give to a woman a pessary to procure an abortion" it was the standard of some, but not all of the physicians of the time. *Id.* at 131.

18. *Id.* at 132-36. It was doubtful that "abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus." *Id.* at 136. A quick fetus is a fetus that has made "its first recognizable movement . . . in utero." *Id.* at 132.

19. *Id.* at 136-38. The present English statute "permits a physician, without the concurrence of others, to terminate pregnancy where he is of the good faith opinion that the abortion is immediately necessary to save the life or to protect grave permanent injury to the physical or mental health of the pregnant woman." *Id.* at 138.

20. *Id.* at 138-41. At the time of the adoption of the Constitution and throughout the majority of the nineteenth century, abortion was viewed with less disfavor than under most American statutes currently in effect. "Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy." *Id.* at 141.

21. *Id.* at 141-44. The American Medical Association has taken the position that "abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law and that no party to the procedure should be required to violate personally held moral principles." *Id.* at 143.

22. *Id.* at 144-46. The American Public Health Association has taken the position that abortions should be performed by physicians or osteopaths who are licensed to practice and who have adequate training. *Id.* at 146.

23. *Id.* at 146-47. The American Bar Association approved the Uniform Abortion Act. *Id.* at 146.

24. *Id.* at 147.

25. *Id.* at 148-49.

neither the courts nor commentators have taken that position seriously, and it is not a proper state concern.[26] The second reason merited more attention. That reason was that when anti-abortion laws were first enacted, the woman's health was a major concern of the state because of the hazardous nature of the abortion procedure.[27] Though modern medical techniques have mitigated that concern, "the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy."[28] The third reason extended the concept that the later the abortion occurs in the pregnancy the greater the danger.[29] While not attempting a determination of when life begins,[30] the Court said that "[i]n assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone."[31]

The next section of the opinion dealt with Jane Roe's main argument that the Texas statutes denied her a right of privacy, which included an absolute right to "terminate her pregnancy at whatever time . . . and for whatever reason, she alone chooses."[32] The Court had no difficulty deciding that the right of privacy, whether it be founded in the Fourteenth Amendment (which the Court espoused), or in the Ninth Amendment (espoused by the District Court), included "the abortion decision."[33] In essence the holding of *Roe* has two elements, and is as follows:

> (1) the liberty guaranteed by the Constitution encompasses a right of privacy;[34] and
> (2) that right of privacy encompasses the right to abort an un-

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26. *See id.* at 148.
27. *Id.*
28. *Id.* at 150.
29. *Id.*
30. *See id. But cf.* the Court's reference to "prenatal life." *Id.* at 155-56.
31. *Id.* at 150.
32. *Id.* at 153; *see id.* at 120, 152-56.
33. *Id.* at 154. The Court stressed the importance of the relationship between the patient and her physician. *Id.* at 153, 156.
34. *Id.* at 152. The Court relied primarily on Eisenstadt v. Baird, 405 U.S. 438 (1972), Stanley v. Georgia, 394 U.S. 557 (1969), Terry v. Ohio, 392 U.S. 1 (1968), Katz v. United States, 389 U.S. 347 (1967), Loving v. Virginia, 388 U.S. 1 (1967), Griswold v. Connecticut, 381 U.S. 479 (1965), Skinner v. Oklahoma, 316 U.S. 535 (1942), Palko v. Connecticut, 302 U.S. 319 (1937), Olmstead v. United States, 277 U.S. 438 (1928), Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925), Meyer v. Nebraska, 262 U.S. 390 (1923), and Boyd v. United States, 116 U.S. 616 (1886) for that proposition. *Roe*, 410 U.S. at 152-53.

wanted pregnancy.[35]

The Court recognized, however, that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[36] Hence, the right of personal privacy "is not unqualified and must be considered against important state interests in regulation."[37] Referring to recent abortion cases that struck down anti-abortion statutes, the Court said that it "generally scrutinized the State's interests in protecting health and potential life and have concluded that neither interest justified broad limitations on the reasons for which a physician and his patient might decide that she have an abortion in the early stages of pregnancy."[38]

Part IX of the opinion set forth the Court's response to Texas's argument that, because a "person" is created at conception, the State has an interest in protecting that person during the length of the pregnancy.[39] The Court first noted, "[N]o case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment"[40] and "[t]he Constitution does not define 'person' in so many words."[41] The Court further observed that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, [which] persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[42] Not being completely satisfied with that response to the State, but also not wishing to consider the "difficult question of when life begins"[43] or enter that "most sensitive and difficult"[44] area of discussion, the Court explored the point at which the State has such a compelling interest in protecting "the mother or that of potential human life"[45] that the

35. *Roe*, 410 U.S. at 153-54. The Court relied upon Buck v. Bell, 274 U.S. 200 (1927) and Jacobson v. Massachusetts, 197 U.S. 11 (1905) to establish that the Court has refused to recognize that this right is unlimited. *Roe*, 410 U.S. at 153-54.

36. *Roe*, 410 U.S. at 153-54. In fact, Justice Blackmun considered the outline of the State's interests in abortion (*see infra* text accompanying note 53) the "holding" of the case. *Id.* at 165.

37. *Id.*

38. *Id.* at 156.

39. *Id.* at 156-62.

40. *Id.* at 157.

41. *Id.*

42. *Id.* at 158.

43. *See id.* at 159.

44. *See id.* at 160.

45. *Id.* at 159.

State might become "significantly involved."[46] It was here that the Court used two words which paved the way for its related "trimester framework"[47] set forth in Part X. The Court stated that the fetus must be "viable[48] or at least quick,"[49] in order for the State to invoke rules and regulations about protecting the life, or the potential life of the fetus—though adding the caveat that "the unborn have never been recognized in the law as persons in the whole sense."[50]

In Part X of its opinion the Court developed what it later called its "rigid trimester framework,"[51] which identifies the point in pregnancy after which a state "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."

> This means . . . that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.[52]

Part XI of the opinion summarized the Court's position:

> For the stage prior to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of

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46. *Id.*

47. More is said about the "trimester framework" in this paper. *See infra* text accompanying note 51; *see infra* notes 74 and 149.

48. "Viable" means being able to live outside the mother's womb. *Roe*, 410 U.S. at 163; *see infra* note 93.

49. *Id.* at 161. "Quick" comes from the English statutes that made abortion after "quickening" an offense. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 952 (1992).

50. *Roe*, 410 U.S. at 162.

51. *See Casey*, 505 U.S. at 873; s*ee also infra* Part II. D.

52. *Roe*, 410 U.S. at 162.

the mother.[53]

Measured by these standards, the Court concluded that the Texas statute, which permitted an abortion only for the purpose of saving the life of the mother, "swe[pt] too broadly," and struck the statute down on due process grounds.[54]

II. SUPREME COURT PROGENY OF *ROE*

As with most judicial decisions, post-*Roe* embellishments have had the effect of both expanding and contracting the scope of the decision. An examination of *Roe*'s progeny helps to distinguish the essential *Roe* holding from later embellishments – in other words, to separate the *Roe* wheat from the progeny chaff.

A. *Separation of Church and State*

As discussed above, Part IX of the *Roe* majority opinion dealt with Texas's argument that a "person" is created at conception and the State therefore has an interest in protecting that person during the length of the pregnancy.[55] The Court recognized that the State does have an interest in protecting potential life, but the Court stopped short of determining when, exactly, "life" begins.[56] It seems that the Court, in terming the "life" question "sensitive and difficult," was nodding to the essentially sectarian and personal nature of such a determination.[57] In the following cases it is clear that the Court has continually reserved judgment on the question of when "life" begins – and has not allowed legislators to overstep this boundary, either.

In *Maher v. Roe*,[58] the Court upheld governmental regulations that withheld public funds for non-therapeutic abortions, but allowed payments for medical services related to childbirth, permitting a government to favor childbirth over abortion through the allocation of other public resources, such as hospitals and medical staff.[59] Under *Maher* the government may, in other words, make a value judgment to support birth over abortion through various in-

53. *Id.* at 164.
54. *Id.* at 164.
55. *Id.* at 156-62.
56. *Id.* at 159-60.
57. *Id.* at 162 ("[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.").
58. 432 U.S. 464 (1977).
59. The Court opined that *Roe* implied no limitation on a state's authority to make a value judgment favoring childbirth over abortion. *Id.* at 474.

centives, but the determination of what is "life" must be left to the medical community, divorced from any sectarian position. Thus, in *Colautti v. Franklin*, the Court struck down the Pennsylvania Abortion Control Act, which governed the determination of viability.[60] The Court made clear that neither the legislature nor the courts may proclaim the ascertainment of viability—the viability determination must be a matter for the responsible attending physician.[61]

Sixteen years after *Roe* and with four changes in its composition,[62] the Court sustained the principle of the separation of church and state in *Webster v. Reproductive Health Services*,[63] where it considered certain provisions of a Missouri abortion statute. Chief Justice Rehnquist authored the majority opinion, which refused to rule on the constitutionality of the statute's preamble proclaiming that life began at conception.[64] The Court determined that it need not consider the constitutionality of the preamble for essentially two reasons. First, *Roe* does not impose a limitation on a state's authority to make a value judgment favoring childbirth over abortion, and the preamble can be read simply to express that sort of value judgment.[65] The second reason given by the Court was that until the courts of Missouri have used the preamble in some litigated matter it is premature for the Supreme Court to interpret it.[66]

The opinion declared that provisions of the statute forbidding the use of public funds, employees, or public facilities for the purpose of encouraging or counseling a woman to have an abortion

60. 439 U.S. 379, 380 (1979). The ostensible ground was vagueness, but the Court made it clear that the trimester framework incorporated only one definition of viability—the Court's—as the Court forbade states to decide that a certain objective indicator (be it weeks of gestation, fetal weight, or any other) should govern the definition of viability. *Id.* at 388-89.

61. *Id.*

62. The *Roe* Court consisted of Justice Blackmun, Chief Justice Burger and Justices Douglas, Stuart, Powell, Brennan, and Marshall in the majority, and Justices Rehnquist and White in dissent. The *Webster* Court consisted of Chief Justice Rehnquist and Justices White, O'Connor, Kennedy, and Scalia in the majority, and Justices Brennan, Marshall, and Blackmun in the dissent. Justice Stevens concurred in part and dissented in part.

63. Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

64. The preamble to the statute set forth findings that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health and well-being;" and that all Missouri state laws be "interpreted to provide unborn children with the same rights enjoyed by other persons subject to the Federal Constitution and Supreme Court precedents." *Id.* at 501.

65. *Id.* at 504-07.

66. *Id.* at 506-07.

which was not necessary to save her life were unconstitutional,[67] and found constitutional the portion of the statute requiring a physician, prior to performing an abortion on a woman he has reason to believe is twenty or more weeks pregnant, to ascertain whether the fetus is viable by performing such medical examination and other tests as are necessary to make a finding of the fetus's gestational age, weight, and lung maturity.[68] The Court refused to grant the request of the Missouri Attorney General, counsel for the appellees and the United States, to overrule *Roe v. Wade*.[69] The Court would not do so because the case at bar was distinguishable from *Roe*.[70] Missouri in this case determined that "viability is the point at which [the State's] interest in potential life must be safeguarded."[71] In *Roe*, Texas "criminalized . . . *all* abortions, except when the mother's life was at stake."[72]

Only Justices White and Kennedy joined the part of Rehnquist's opinion dealing with the viability test. That "plurality"[73] found that the gestational provision of the statute created a presumption of viability at twenty weeks that could be rebutted only by test results indicating that the fetus was not viable.[74] *Roe*, they said, held that the State had an interest in the potentiality of human life.[75] However, the plurality argued that the State's compelling interest in human life, recognized in *Roe*, should extend throughout

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67. The statute made it unlawful to use public funds, employees, or facilities for the purpose of encouraging or counseling a woman to have an abortion which was not necessary to save her life. The Court found that the statute was not unconstitutional, as the State was not mandated to "commit any resources to facilitating abortions even if it could turn a profit by doing so." *Id.* at 511. The Court also said that, "The Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." *Webster*, 492 U.S. at 511 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

68. *Id.* at 513-21.

69. *Id.* at 521.

70. *Id.*

71. *Id.*

72. *Id.* at 521.

73. Justice Blackmun refers to Justices Rehnquist, White, and Kennedy, as the "plurality." *See id.* at 537 and *in seriatim* throughout his opinion. Justice O'Connor also uses the term. *See id.* at 525 and *in seriatim*. It is also found in the Syllabus. *See id.* at 495. Justice Scalia joined in all of the "plurality" opinion, except the section discussing viability, because he agreed with Justice Blackmun that "it effectively would overrule *Roe v. Wade*." *Id.* at 532. He wanted *Roe* overruled, but explicitly. *Id.*

74. It was in Part II D of their opinion, dealing with protection to the fetus, that the plurality took a swing at the "trimester framework" dealing with the mother's health: "the rigid *Roe* framework is hardly consistent with the notions of a Constitution cast in general terms, as ours is . . . ." *See id.* at 518.

75. *See Roe*, 410 U.S. at 162.

pregnancy rather than come into existence only at the point of viability.[76] Hence, the plurality argued that *Roe*'s viability requirement should be abandoned.[77] Having said that, the plurality rested on the medical nature of the viability determination: "The Missouri testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable—an end which all concede is legitimate—and that is sufficient to sustain its constitutionality."[78]

Justice Blackmun, joined by Justices Brennan and Marshall, concurred in part and dissented in part. The dissent was directed mainly against the preamble of the statute and its viability-testing provisions.[79] Blackmun concluded his opinion with the following words: "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."[80]

Justice Blackmun severely criticized the "plurality":[81] "Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions. . . . Nor in my memory has a plurality gone about its business in such a deceptive fashion."[82] The charge of deception must have come from his conclusion that the plurality was trying to overrule *Roe* without specifically so stating.[83] Indeed, in a recent article, Dawn E. Johnson stated that "the Court's 1989 decision in *Webster v. Reproductive Health Services* suggests that the Court was at most one judicial appointment away from overruling *Roe* and allowing states to criminalize abortion."[84] But it was the plurality's position that state legislatures had the right to provide for viability testing, particularly since *Roe* held that the State had an interest in the po-

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76. *Webster*, 492 U.S. at 519.

77. *Id.* at 518-19.

78. *Id.* at 520.

79. *Id.* at 537-56. It is not clear from a reading of Justice Blackmun's opinion with which part of the Court's judgment he concurred. The preamble's constitutionality was determined in the majority opinion, and the viability-testing part was addressed in the plurality opinion. While his opinion does not explicitly so state, it could be concluded that his concurrence was with Part II C of the plurality opinion. *See id.* at 539 n.1.

80. *Id.* at 560.

81. Justices White and Kennedy, in addition to Chief Justice Rehnquist.

82. *Id.* at 538.

83. *Id.* at 537.

84. Dawn E. Johnson, *Functional Departmentalizationism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW AND CONTEMP. PROBS. 105, 145 (2004).

tentiality of human life.[85] This appears to be a logical extension of *Roe*, well within the confines of the argument that the courts should not engage in such sectarian pursuits as attempting to determine when life begins.[86]

Adherence to the principle of the separation of church and state is reinforced in the Court's later, landmark case *Planned Parenthood v. Casey*, discussed below. First, we turn to an introduction of other key elements of the *Roe* decision.

B. *Grist for the Litigation Mill*

Roe held that the point at which the State's interest in protecting potential life becomes compelling is the point of "viability,"[87] which the Court determined occurs at approximately seven months, though possibly as early as twenty-four weeks.[88] However, this determination of when, exactly, "viability" occurs was incidental and not intrinsic to the holding that the State's interest becomes compelling at viability. The following cases demonstrate that what constitutes "viability" is a fluid question, depending on medical advances, that may be debated continually in the years to come, and that an overruling of *Roe* is not necessary to allow such changes in the understanding of viability. *Roe* also held that the point at which the State's interest in protecting the health of the mother becomes compelling is "approximately the end of the first trimester."[89] But this "rigid trimester framework" has, similarly, proven inessential to the *Roe* holding. Indeed, the Court's move from the trimester framework to the "substantial burden" test in *Planned Parenthood v. Casey* demonstrates as much. The seeds of the substantial burden test were planted in the cases leading up to the *Casey* decision.

At issue in *City of Akron v. Akron Center for Reproductive Health, Inc., (Akron I)*, was a city ordinance requiring that all abortions after the first trimester be performed in a hospital; that the attending physician must obtain the consent of a parent of a minor under 15 years of age, or a court order; that the attending physician inform the patient of the status of her pregnancy, the development of the fetus, the date of possible viability, the physical and emo-

85. *See supra* text accompanying notes 36-38.
86. *See infra* text accompanying notes 164-69.
87. *Roe*, 410 U.S. at 163.
88. *Id.* at 160.
89. *Id.* at 163.

tional complications that may result from an abortion, the availability of agencies to provide her with assistance and information regarding birth control, adoption, and childbirth; a twenty-four hour waiting period after the physician receives a signed consent from the patient; and that the fetal remains be disposed of in a "humane and sanitary manner."[90] The ordinance was struck down as unconstitutional.[91]

The Court's opinion began with a reaffirmation of *Roe* on the basis of stare decisis.[92] The main thrust of the opinion was that under *Roe* the State has two interests in the area of abortions—first, protection of the potentiality of human life,[93] and second, protection of the mother's health.[94] In its analysis, the Court determined that the ordinances imposed a significant burden on a woman's access to an abortion without any showing of necessity to meet the State's interests.[95] Though the *Akron I* Court specifically reaffirmed *Roe*,[96] the *Casey* Court overruled *Akron I* to the extent that it was inconsistent with *Roe's* statement that a "State has a legitimate interest in promoting the life or potential life of the unborn."[97] In her dissent, Justice O'Connor, joined by Justices White and Rehnquist,[98] forecast her displeasure with the trimester framework of *Roe*.[99] She initially wrote, "The decision of the Court today graphically illustrates why the trimester approach is a completely unprincipled method of accommodating the conflicting

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90. City of Akron v. Akron Center for Reproductive Health, Inc. (*Akron I*), 462 U.S. 416, 422-24 (1983).

91. *Id.* at 431, 452.

92. *Id.* at 419-20. Justice Powell wrote the six member majority opinion. Powell described *Roe v. Wade* as holding "the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy." *Id.* at 419.

93. *Id.* at 428. Pursuant to *Roe*, this interest becomes compelling only at viability—the point at which the fetus "has the capability of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163.

94. *Akron I,* 462 U.S. at 428-29. Pursuant to *Roe*, the health of the mother does not become compelling until the end of the first trimester. *Roe*, 410 U.S. at 163.

95. *Akron I,* 462 U.S. at 428. Justice O'Connor, joined by Justice White and then-Justice Rehnquist, dissented, saying, *inter alia,* that "[h]ealth-related factors that may legitimately be considered by the State go well beyond what various medical organizations have to say about the *physical* safety of a particular procedure." *Id.* at 467.

96. *See supra* text accompanying note 104.

97. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992), *infra* Part II. D, in a joint opinion written by Justices O'Connor, Kennedy, and Souter.

98. Justices White and Rehnquist were the two dissenters in *Roe*. Justice O'Connor, however, would go on to author the *Casey* opinion, affirming the *Roe* holding while doing away with the trimester framework.

99. *Akron I*, 462 U.S. at 452.

personal rights and compelling state interests that are involved in the abortion context."[100] At the urging of Justice Blackmun she changed the word "unprincipled" to "unworkable" because "she wanted to avoid anything that even indirectly appeared to be an *ad hominem* attack."[101]

Vexation was beginning to show on the Court with the direction in which *Roe*'s progeny were taking the *Roe* holding, though not necessarily with the holding of *Roe* itself. In *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court struck down Pennsylvania's Abortion Control Statute, which contained six requirements for an abortion to be permitted.[102] In his *Thornburgh* dissent, Chief Justice Burger wrote, "The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent."[103] Also dissenting, Justice White wrote, "The Court engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences."[104] Justice O'Connor (with whom then Justice Rehnquist joined) wrote, "This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence."[105] Although the *Thornburgh* Court specifically reaffirmed *Roe*,[106] as it had in *Akron I*, the *Casey* Court overruled *Thornburgh* to the extent that it was inconsistent with *Roe*'s statement that a state has a legitimate interest in promoting the life, or potential life, of the unborn.[107]

Hodgson v. Minnesota[108] answered what appeared to be a

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100. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 144 (Henry Holt & Co. 2005).

101. *Id.*

102. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986). The requirements were 1) that women be advised that medical assistance may be available, 2) that women be advised that the child's father is responsible for financial assistance, 3) that the physician inform the woman of detrimental physical and psychological effects and of all medical risks of abortions, 4) that women be advised of certain reporting requirements, 5) that women be advised of provisions governing the degree of care for post-viability abortions, and 6) that a second physician is present during an abortion. *Id.* at 763-64. The last provision, about the second physician, was struck down only because it contained no exception for an emergency. *Id.* at 770-71.

103. *Id.* at 783.

104. *Id.* at 794.

105. *Id.* at 814.

106. *Id.* at 759.

107. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992); *see infra* Part II. D.

108. 497 U.S. 417 (1990).

question of limited proportions with a complex set of opinions covering a wide range of subjects. The Minnesota statute at issue provided that, with certain exceptions, no female under the age of eighteen years could obtain an abortion unless both of her parents were notified, and even then a forty-eight hour waiting period was required.[109] The statute did provide for a "judicial bypass," by which the minor could seek a court order finding that she possessed sufficient maturity to make the decision of whether to abort her pregnancy without parental notification. The United States Court of Appeals for the Eighth Circuit held the two-parent notice requirement unconstitutional because it was an unreasonable restraint upon a young woman's liberty. The notice requirement with the judicial bypass provision, however, was constitutional and saved the statute from being declared wholly invalid.[110] On appeal, the Court affirmed the Eighth Circuit's decision, holding that the two-parent notice requirement without judicial bypass was unconstitutional.[111] Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia wrote an opinion concurring in part and dissenting in part. The dissent took the position that the requirement of notice to both parents was constitutional even without the judicial bypass provision.[112]

Justice O'Connor wrote a separate concurring opinion.[113] Justice Marshall, joined by Justices Brennan and Blackmun, wrote a separate concurring and dissenting opinion, primarily clarifying that he thought that the bypass did not save the statute because the provision itself was unconstitutional,[114] and that the forty-eight hour waiting period burdened the rights of minors.[115]

Justice Scalia wrote a separate opinion, concurring in part and dissenting in part.[116] He noted the fragmentation over abortion cases into which the Court was drifting, which prompted him to write:

> The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term af-

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109. *Id.* at 422; MINN. STAT. § 144 343(2)-(7) (1998).

110. *Hodgson*, 497 U.S. at 431.

111. *Id.* at 422-23.

112. *Id.* at 500.

113. Justice O'Connor agreed that a woman's decision to conceive or bear a child is a component part of her liberty, which is protected by the Fourteenth Amendment's Due Process Clause. *Id.* at 458.

114. *Id.* at 461-62.

115. *Id.* at 467.

116. *Id.* at 479-80.

> ter Term, that the tools for this job are not to be found in the lawyer's—and hence not in the judge's—workbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so.[117]

Justice Scalia's words notwithstanding, *Roe* has so far proven able to overarch such debate and encompass a wide variety of views. Differing determinations of the terms "viability" and "substantial obstacle" do not require an overruling of *Roe*. This becomes most clear in the Court's later, landmark case *Planned Parenthood v. Casey*, discussed below. First, we turn to an introduction of a final key element of the *Roe* decision.

C. *Theories of Privacy Right*

Roe v. Wade held that a state statute that made it a crime to obtain, or attempt to obtain, an abortion, except for the purpose of saving the life or protecting the health of the mother, was unconstitutional.[118] The rationale of the case was that liberty, which is guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, is broad enough to include a right of privacy.[119] The right of privacy includes the right, though not unqualified,[120] to decide whether to terminate an unwanted pregnancy.[121]

Wilson Huhn points out that the present Court[122] is split into two schools of thought concerning the constitutional basis for the right of privacy, which is not explicitly mentioned in the Constitution.[123] One school of thought[124] takes the position that the right of privacy is not defined by reference to specific American traditions, but rather by reference to society's "emerging awareness" of the effect of laws on people's lives.[125] The other school of thought[126]

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117. *Id.* at 480.

118. 410 U.S. 113, 164 (1973).

119. *Id.* at 152-53.

120. The "state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." *Id.* at 154-55.

121. *Id.* at 153.

122. The recent replacement of Chief Justice Rehnquist with Chief Justice Roberts is not factored into this theory, and Chief Justice Roberts's appointment to the Court is too recent to place him in one or the other school of thought on this issue.

123. *See* Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in* Grutter *and* Lawrence, 12 WM. & MARY BILL RTS. J. 65, 76 (2003).

124. Consisting of Justices Stevens, Kennedy, O'Connor, Souter, Breyer, and Ginsburg.

125. Referring to the Supreme Court's decision in *Lawrence v. Texas*, Huhn bases his conclusion not on the fact that sodomy had a history of approval, but that in this

sees tradition as the only legitimate source of our unenumerated rights.[127] In other words, six members look not to whether privacy has been considered a constitutionally guaranteed right, but to whether privacy is thought of as "a general right to make 'personal and intimate choices' that are 'central to personal dignity and autonomy.'"[128] Huhn writes:

> [I]n *Lawrence* the majority of the Supreme Court embraced an expansive definition of the 'right to privacy,' adopting the passage from the plurality opinion in *Casey* that people are free to make 'intimate and personal choices' not because these choices are 'traditional' rights, but because these choices are 'central to personal dignity and autonomy. . . . [I]t has now been accepted by six members of the Supreme Court as expressing their understanding of the right to privacy. By focusing on the effect that the law has on a person's personal, intimate choices, this doctrinal shift legitimizes the consequentialist approach that Justice Blackmun employed in *Roe* in applying the right to privacy.[129]

Indeed, the 6-3 division among the justices into these two schools of thought regarding the right to privacy suggests that a majority of the current Court would not vote to overrule *Roe*.[130]

D. Planned Parenthood of Southeastern Pennsylvania v. Casey *(1992)*

The foregoing arguments regarding why *Roe v. Wade* will not likely be overruled in the near future are further grounded in the

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country there is "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Huhn, 12 WM. & MARY BILL RTS J. at 76, (quoting from Lawrence v. Texas, 539 U.S. 558, 571 (2003)).

126. Consisting of Chief Justice Rehnquist and Justices Scalia and Thomas.

127. This position is best illustrated in note 6 of Justice Scalia's opinion in Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) (upholding a California statute which denied a biological father a right to establish his paternity of a child conceived by his sexual partner, a woman who was married to another man). The essence of the position is represented by the following words: "Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all." *Id.* at 127 n.6. This is consistent with Justice Scalia's well known description of California's traditional in-state service rule to the effect that "its validation is its pedigree." *See* Burnham v. Superior Court, 495 U.S. 604, 621 (1990).

128. Huhn, *supra* note 123, at 73.

129. *Id.* at 76-77.

130. Even if both Roberts and O'Connor's replacement join the school of tradition, the split would still be 5-4 in favor of upholding *Roe* on the grounds that abortion is a privacy right not specifically defined by tradition.

Supreme Court's holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where the Court reviewed several amendments to a Pennsylvania statute.[131] The amendments required 1) that a woman seeking an abortion give consent in writing prior to the abortion, and that she be supplied with certain information at least twenty-four hours prior to the abortion; 2) that if the woman was a minor, the informed consent had to be given by one parent;[132] and 3) that married women were required to sign a statement that they had obtained their husband's consent.[133] These three requirements were excused in the event of a "medical emergency."[134] Before the Act took effect, the petitioners (five abortion clinics and a physician) sought declaratory and injunctive relief in a United States District Court. The court held the Pennsylvania statute unconstitutional and permanently enjoined its enforcement.[135] The Third Circuit upheld all of the statutory restrictions except the husband notification provision.[136] At oral argument before the U.S. Supreme Court, the petitioners argued that none of the State's requirements could be upheld without overruling *Roe v. Wade*.[137] Justices O'Connor, Kennedy, and Souter wrote the major portions of the Court's "joint" opinion.[138] While they acknowledged that the Court's "decisions after *Roe* cast doubt upon the meaning and reach of its holding,"[139] they did not agree with the petitioners that *Roe* must be overruled to uphold the amendments in question,[140] although they did not uphold all of the amendments. "After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity and the rule of stare decisis we conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[141]

The authors of the joint opinion lost no time in making clear just what they considered was the "essential holding" of *Roe v.*

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131. 505 U.S. 833 (1992).

132. The amendment also provided a judicial bypass provision. *Id.* at 844.

133. *Id.*

134. *Id.* A fifth amendment required abortion facilities meet certain reporting and record-keeping requirements. *Id.* This amendment is not addressed in this Article.

135. *Id.* at 845.

136. *Id.*

137. *Id.* at 845.

138. *Id.* at 843.

139. *Id.* at 845. They added that Chief Justice Rehnquist admitted "that he would overrule *Roe* and adopt the rational relationship test as the sole criterion of constitutionality." *Id.*

140. *Id.* at 845.

141. *Id.* at 845-46.

Wade. It contained three major points:[142]

> First, recognition of the right of a woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability the State's interests are not strong enough to support prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second, a confirmation of the State's power to restrict abortions after fetal viability if the law contains exceptions for pregnancies which endanger the woman's life or health. And third, the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[143]

In its reaffirmation of *Roe*, the joint opinion made clear that "[a]lthough *Roe* has engendered opposition, it has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which a state law is unenforceable."[144] The "workability" of the *Roe* holding was an essential part of the Court's stare decisis determination. Admittedly, the Court also emphasized the effects that overruling *Roe* could have on the public and on the Court's legitimacy:

> [I]t is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.[145]

The Court stated, almost with a plea, that:

> A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original

142. *Id.* at 846.

143. The authors said that this was the "most central principle" of the case, a rule of law and a component of liberty that they could not renounce. *See id.* at 871. Later in the joint opinion they said that "before that time [viability] the woman has a right to choose to terminate her pregnancy." *Id.* at 870.

144. *Id.* at 855 (citations omitted).

145. *Id.* at 869.

decision, and we do so today.[146]

The joint opinion has been criticized for its appeal to the "damage to the Court's legitimacy" that would result from an overruling of *Roe*. Michael Stokes Paulsen says:

> This is an astonishing proposition. What if the thing that makes a decision a "watershed" is that it was a grotesque departure from the Constitution—a massive, unfounded judicial coup d'etat taken in the name of the Constitution? The notion that the more dramatic a precedent's departure from the Constitution, the more tenaciously the Court should cling to it—lest the people recognize the departure for the lawlessness it is—is positively repulsive.[147]

This may be so, but the Court's upholding of *Roe* was not premised solely on the desire to avoid the problems overruling *Roe* would generate; the Court felt the *Roe* holding was still practicable. *Casey*'s holding is profound, though not as broad as its 169 page length might indicate.[148] It simply rejected the so-called "trimester framework" of *Roe*.[149] The Court used the essential holding of *Roe* to craft an updated method of balancing the State's interests against those of the mother.[150] In Part IV of the opinion, the Court replaced the trimester framework with the "undue burden" test, which seeks to determine whether a state has exceeded its constitutional authority to place some limits on a woman's right to choose in abortion cases.[151]

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146. *Id.*

147. Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1031 (2003).

148. What the Court in *Casey* referred to as *Roe*'s "essential holding" (*see supra* text accompanying note 142-43), is really the rationale for the *Casey* holding. In order to overrule *Roe* both its holding and its rationale would have to be discarded by the Court. *See Casey*, 505 U.S. 833, 872-73, 878-79 (1992).

149. The trimester framework of *Roe* was, in essence, that state legislatures were free to place restrictions on the right of a woman to choose an abortion after approximately the end of the first trimester of pregnancy, but that prior to that time the pregnant woman was free to make her own informed choice. *Casey*, 505 U.S. at 879.

150. *Id.* at 873, 878. There had been discontent with the so-called trimester framework for some time. Justice White in his dissent in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 99 (1976), wrote that the trimester framework had caused the Court to serve as the country's "ex officio medical board with powers to approve or disapprove medical and operative practice and standards throughout the United States."

151. The trimester framework was found to be "unsound in principle and unworkable in practice" by Chief Justice Rehnquist writing for himself and Justice Kennedy in Webster v. Reproductive Health Servs., 492 U.S. 490, 518 (1989) (citation omitted).

The "undue burden" test was considered "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[152] Under this test, if the purpose or effect of abortion legislation is to place a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus, it will be held unconstitutional, as an "undue burden" on the pregnant woman.[153] The joint opinion stated:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[154]

The Court reiterated the sanctity of the woman's right to choose,[155] but emphasized that the State had strong interests in protecting the life of the unborn:

> Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.[156]

In sum, the "trimester framework," in the Court's view, needed replacing for it did not sufficiently recognize the State's interest in the area of abortions.[157] The terms "substantial obstacle" and "nonviable fetus" will be grist for the litigation mill for some time

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152. *Casey*, 505 U.S. at 876.
153. *Id.*
154. *Id.* at 877.
155. *Id.* at 872.
156. *Id.*
157. *Id.* at 876.

to come.[158] The need for construction, however, is not a ground for overruling an opinion that leaves room for interpretation.

In Part IV of the opinion, the Court also addressed that aspect of *Roe v. Wade* that makes it an anathema to large segments of the Judeo-Christian community—that is, the question when life begins.[159] Many people believe that life begins at conception, and that giving a woman a choice to abort a pregnancy is giving her a right to commit murder.[160] The authors of the *Casey* joint opinion realized that they were at "the point where much criticism ha[d] been directed at *Roe*."[161] *Casey* did not go so far as to attempt an answer to the question of when life begins, but repeated that it was at the point at which the fetus became "viable" or "quick" that the State had an interest in imposing regulation on abortions.[162] The joint opinion attempted a definition of "viability" as "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman."[163] This explanation of when life begins is no more definite than that attempted by Justice Blackmun in *Roe v. Wade*. But this must be acceptable. It is not the function of the Supreme Court or any court in a country that maintains a separation of church and state,[164] to make judicial pronouncements upon non-secular matters.[165] Would not the "realistic possibility of maintaining and nourishing a life outside the womb"[166] encompass religious beliefs, moral convictions, "biological appreciations,"[167] and just plain "gut" reactions as

158. The joint opinion's definition of "viability" will help. *See supra* note 48.

159. *Id.* at 869-79.

160. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 787 (1994) (listing the phrase "God Calls It Murder" as an example of one of the phrases held up on a sign at a protest outside an abortion clinic).

161. *Casey*, 505 U.S. at 869.

162. *Id.* at 870; Roe v. Wade, 410 U.S. 113, 160-61 (1973); *see supra* text accompanying notes 48-49.

163. *Casey*, 505 U.S. at 870.

164. *See* U.S. CONST. amend. I.

165. *See* Colautti v. Franklin, 439 U.S. 379, 390-97 (1979) (striking down a statute which governed the determination of viability; *see also Casey*, 505 U.S at 949 (Rehnquist, C.J., concurring in part, dissenting in part).

166. *Casey*, 505 U.S. at 870 (referring to a position taken in *Roe v. Wade*, 410 U.S. at 163).

167. Hill v. Colorado, 530 U.S. 703, 763 (2000) (Scalia, J., dissenting). "For those who share an abiding moral or religious conviction (or for that matter, simply a biological appreciation) that abortion is the taking of a human life, there is no option but to persuade women, one by one, not to make that choice." *Id.*

to whether life begins at conception?

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.[168]

It is sufficient for courts to allow citizens to make their own decisions as to whether abortion is a sin—an inherently sectarian determination. There is nothing in *Roe v. Wade* that requires an abortion if the pregnant woman, for any reason, does not want it.[169]

Regarding the right to privacy, the authors of the joint opinion reiterated that the constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment, which prevents deprivation of "life, liberty or property." The Court intended to place emphasis on "liberty."[170] Justice Scalia wrote a twenty-two page dissent, joined by Chief Justice Rehnquist and Justices White and Thomas.[171] In his dissent, Scalia made an astounding declaration about his version of the basis of the right of a pregnant woman to abort her pregnancy: "liberty includes only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified."[172] Since abortion was not being regulated at the end of the Civil War, it was not encompassed by the word "liberty," according to Justice Scalia. As discussed earlier,[173] however, the justices who would take this traditionalist approach to the right of privacy are in the minority, even if both Chief Justice Roberts and Justice O'Connor's replacement take the traditionalist approach.[174]

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168. *Casey*, 505 U.S. at 850-51.

169. *See Roe*, 410 U.S. at 154 (concluding the abortion decision is a personal right). The remarks of Justice Scalia in a concurring opinion in Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989), to the effect that *Roe* represents a "self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical" are completely off the mark.

170. *Casey*, 505 U.S. at 846.

171. *Id.* at 979.

172. *Id.* at 981.

173. *See supra* Part II. C.

174. Justices Stevens, Kennedy, Souter, Breyer, and Ginsburg would presumably remain in the "emerging awareness" school.

Casey therefore encapsulated the theories found in *Roe* and its progeny regarding the separation of church and state, the right to privacy, and the concept that *Roe* is a working framework within which "viability" and "substantial obstacle" may be developed.

E. *A Blueprint For Overruling A Supreme Court Precedent:* Lawrence v. Texas *(2003)*

Lawrence v. Texas[175] is not a progeny of *Roe v. Wade*, but it is discussed in this article because it provides a list of factors that the Court will consider in overruling a prior Supreme Court case. In *Lawrence*, the Court declared unconstitutional a Texas statute making it a crime for two persons of the same gender to engage in certain intimate sexual conduct.[176] The opinion of the Court, written by Justice Kennedy, proclaimed that the Texas statute was unconstitutional and that a precedent, *Bowers v. Hardwick*,[177] was overruled.[178] *Bowers* had held that a state law criminalizing sodomy as applied to homosexuals did not violate substantive due process.[179]

Justice Kennedy assigned eight reasons for overruling *Bowers*: (1) the *Bowers* Court misinterpreted the issue;[180] (2) legislators' attitudes had changed;[181] (3) two Supreme Court decisions had cast *Bowers*' holding in doubt;[182] (4) in the United States, criticism of *Bowers* had been "substantial and continuing, disapproving of its reasoning in all respects . . . the courts of five states ha[d] declined to follow it";[183] (5) the European Court of Human Rights did not follow it;[184] (6) it could not be saved by stare decisis;[185] (7) it "had

175. 539 U.S. 558 (2003).

176. In the case the men were convicted of sodomy. *Id.* at 563.

177. 478 U.S. 186 (1986).

178. *Lawrence*, 539 U.S. at 578.

179. *Id.* at 567.

180. The *Bowers* Court had said that the issue was whether homosexuals had the right to engage in sodomy; it appears that the Court completely misapprehended the defendants' claim of liberty. *Id.* at 566-67.

181. At the time *Bowers* was decided twenty five states had similar laws. In 2003, the count was thirteen. *Id.* at 573.

182. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) cast doubt on *Bowers* because it emphasized the Constitutional demands for the autonomy of the person in making choices concerning marriage, procreation, contraception, family relationships, child rearing, and education. *Lawrence*, 539 U.S. at 573-74. *Romer v. Evans*, 517 U.S. 620 (1996) cast doubt on *Bowers* because in that case the Court found that a class-based piece of legislation (directed against homosexuals, lesbians and bisexuals) had no rational relation to a legitimate governmental purpose. *Lawrence*, 539 U.S. at 574.

183. *Lawrence,* 539 U.S. at 576.

184. *Id.*

not induced detrimental reliance comparable to some instances where recognized individual rights are involved";[186] and (8) the rationale of *Bowers* could not withstand careful analysis.[187] Unlike in *Lawrence*, it is unlikely that a majority of the current Court will find that *Roe*'s holding falls short of so many factors. Indeed, in *Casey*, the Court found insufficient indication that *Roe* was unworkable precedent.

> So in this case we may enquire whether *Roe*'s central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society; and whether *Roe*'s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.[188]

Although there is significant public discomfort with the *Roe* holding, it will not be as simple as arguing that "life" begins at conception to effect an overruling. Rather, the Court will look at myriad factors and will likely be looking for such tangibles as a change in the attitudes of the American Medical Association and the American Public Health Association regarding "viability."

III. Conclusion

The resignation of Justice Sandra Day O'Connor and the death of Chief Justice William H. Rehnquist, and resulting changes on the Court, have led many to question whether *Roe* will be overruled,

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185. "The doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of law. It is not, however, an inexorable command." *Id.* at 577 (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)). "[I]t is a principle of policy and not a mechanical formula of adherence to the latest decision." *Id.* (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

186. *Id.* Justice Kennedy's exact words were: "Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so." *Id.*

187. Justice Stevens dissented in *Bowers*. He wrote, "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons." *Bowers*, 478 U.S. at 216 (citation omitted). Justice Kennedy said that Justice Stevens was correct and the majority in *Bowers* was wrong. *Lawrence*, 539 U.S. at 578.

188. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 at 855 (1992).

particularly given the more conservative bent of George W. Bush appointees. This article offers at least four reasons why an overruling of *Roe* is unlikely.

First, a majority of the Court supports an "emerging awareness" theory of the right to privacy, rather than a traditionalist approach. Despite changing personnel on the Court, it is likely that the "emerging awareness" school, a current majority on the Court, would still deem abortion to be a "personal and intimate" decision, and thus a privacy right.

Second, a basic premise of the *Roe* decision was that "viability" should be determined according to current medical standards, rather than by any moral or religious notion of when "life" begins. This approach is not likely to change, because it is grounded in the foundational principle of the separation of church and state. The concept of personal choice is protected by that fundamental principle. It is worth noting here that we have a real impasse between the life-at-conception believers (the so-called "right-to-life" people), and those who believe that *Roe v. Wade* was the correct decision in the matter of abortion (the so-called "pro-choice" people). Overruling *Roe* is not the way to resolve the problem. The shibboleths "pro choice" and "pro life" only compound the impasse. That one is "pro choice" does not mean that he or she is not also "pro life." One may be "pro life" for himself, but leave to others what choice they may make for themselves. Religion helps a person make a choice for him or herself, but religion does not give one a license to make that choice for another.[189]

Third, the terms "substantial obstacle" and "nonviable fetus" will be grist for the litigation mill for some time to come. The need for construction, however, is not a ground for overruling an opinion that leaves room for interpretation. As the foregoing discussion of *Akron* and *Thornburgh* demonstrated, the Court is reluctant to overrule *Roe*—indeed, the Court specifically affirmed *Roe*—in the face of differing interpretations of its holding. Rather, *Roe* has long served as a framework within which the details can be fine-tuned.

Finally, the foregoing discussion of *Lawrence* indicates that the Court would require more than differing philosophies among the justices regarding when "life" begins to overrule *Roe*. The Court

189. Texas Supreme Court Justice Nathan Hecht said that "[r]eligion says a lot about who you are personally, but it says nothing about stare decisis, the commerce clause, the First Amendment, [or] search and seizure . . . ." Nancy Gibbs, *The Two Knocks on Miers*, TIME, October 17, 2005 at 40.

would look to a number of factors, as it did in *Lawrence*, to determine societal trends, including current medical standards.

On November 24, 2004, the First Circuit Court of Appeals held unconstitutional a New Hampshire statute that prevented abortions from being performed on unemancipated minors until forty-eight hours passed following parental notification.[190] The statute waived the notice provision if the abortion was necessary to save the life of the minor, but it did not contain a similar waiver to protect the minor's health in non- life threatening situations. During the preparation of this article, the United States Supreme Court heard the case.[191] When the Court decides the case this term, the theories posited in this article will be put to a test with perhaps two new Justices sitting on the Court.

190. Planned Parenthood of N. New Eng. v. Heed, 390 F.3d 53 (1st Cir. 2004).

191. *Heed*, 390 F.3d at 53, *cert. granted sub. nom.*, Ayotte v. Planned Parenthood of N. New Eng., No. 04-1144, 2005 WL 483164 (May 23, 2005). The case was heard on November 30, 2005.